

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 251 of 1984

and

INCOME TAX REFERENCE NO. 252 OF 1984

For Approval and Signature:

Hon'ble MR.JUSTICE R.BALIA. and

MR.JUSTICE A.R.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

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BARODA SPINNING & WEAVING MILLS CO. LTD.

Versus

COMMISSIONER OF INCOME TAX

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Appearance:

OFFICIAL LIQUIDATOR for Petitioner

MR MANISH R BHATT for Respondent No. 1

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CORAM : MR.JUSTICE R.BALIA. and

MR.JUSTICE A.R.DAVE

Date of decision: 06/04/99

ORAL JUDGEMENT

#. These two references in respect of the same assessee raise identical issue covering the period assessment years 1977-78 to 1980-81. The assessee company was in liquidation. During the winding up proceedings, it had

income by way of interest accruals. As the company had discontinued its business it was liable to be assessed under the head 'income from other sources'. The company also had unabsorbed depreciation of the earlier years carried forward for the purpose of being set off against profit and gains of subsequent orders. The Income Tax Officer has disallowed the claim of the assessee on the ground that since the assessee had no profits or gains chargeable under the head 'income from business' but had his taxable income from other sources, the carry forward unabsorbed depreciation was liable to be set off. That order was not ultimately affirmed by the Tribunal holding that the assessee was not entitled to set off on depreciation because it has ceased to carry on business.

#. At the instance of the Company (in liquidation in ITR 251 of 1984 for the assessment period 1978-79 to 1980-81 following question of law has been referred to this court for its opinion:

"Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in holding that set off of unabsorbed depreciation allowance carried forward from earlier years could not be allowed against the income from other sources unless the assessee had income falling under Section 28 of the Income Tax Act, 1961?"

#. In ITR 252 of 1984 relating to assessment year 1977-78 following question of law has been referred at the instance of CIT:

"Whether, on the facts and circumstances of the case, the Tribunal was right in law in holding that set off of unabsorbed depreciation allowance carried forward from earlier years could not be allowed against the income from other sources unless the assessee had income falling under Section 28 of the Income Tax Act, 1961?"

#. At the time of hearing learned counsel for the Revenue candidly stated that the issue is to be resolved in favour of the assessee in view of the decision of the Supreme Court in CIT v. Virmani Industries Private Limited 216 ITR 607 wherein the court has held considering the meaning of expression "profits or gains chargeable within the meaning of Section 32(2) with reference to Section 72(2) and 73(3):

"On the first impression, the said expression

appears to refer only to profits or gains of business or profession chargeable under Section 28. But this court has repeatedly held that the said expression is not so confined and that it refers to income under all the heads of income specified in Section 14"

#. The Court reiterated the view expressed in Rajapalayam Mills Limited. V. CIT 115 ITR 777 and CIT vs. Jaipuria China Clay Mines Private Limited 59 ITR 555:

"Now, it is well-settled, as a result of the decisions of this court that the words 'no profits or gains chargeable for that year' are not confined to profits and gains derived from the business whose income is being computed under section 10, but they refer to the totality of the profits or gains computed under the various heads and chargeable to tax."

#. As to the necessity of carrying on the business activity in the succeeding year as a condition for the carried forward only the unabsorbed depreciation to be set off against the income of such subsequent years, the Court negatived the same and held:

"Yet another question which has to be answered before we can answer the question concerned in this appeal is whether it is necessary that in the following year the assessee must carry on business, that is some or other business, to avail of the benefit of the said subsection? Two views are possible in this behalf, viz. (1) since the subsection speaks of unabsorbed depreciation being carried forward to the next year and "added to the amount of the allowance for depreciation for the following previous year and deemed to be part of that allowance" the subsection necessarily contemplates existence of a business in the following year, and (2) inasmuch as the subsection not only speaks of adding the unabsorbed depreciation to the depreciation allowance allowed in the following year but also says that in the absence of such allowance, the carried forward depreciation allowance shall be the allowance for that year, it means that in the following year the assessee need not carry on any business or profession for availing of the benefit of subsection (2) of section 32. We are inclined to adopt the second of the above two views having regard to the

decisions of this Court in Jaipuria China Clay Mines (P) Ltd.'s case (1966) 59 ITR 555 and Rajapalayam Mills Ltd.'s case (1978) 115 ITR 777. We have extracted the relevant observations from both the judgments hereinabove, which say that the unabsorbed depreciation allowance has not only to be set off against other heads of income in the relevant previous year but where it is carried forward, it "stands on exactly the same footing as the current depreciation

#. In view of the aforesaid, we answer the question referred to us in negative, that is to say, in favour of the assessee and against the revenue by holding that the Tribunal was not right in holding that the set off of unabsorbed depreciation carried forward from earlier years could not be allowed against the income from other sources unless the assessee had income falling under Section 28 of the Income Tax Act.

There shall be no order as to costs.

(Rajesh Balia, J) (A.R. Dave, J)